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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 722

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE LOYAL BAND OR GROUP OF CREEK INDIANS, AND THE LOYAL CREEK CLAIMANTS' COMMITTEE, ON THE RELATION OF JOSEPH BRUNER, S. W. BROWN, JESSE MCDERMOTT, LASLEY HAYNES, BEN JOHNSON, ROBERT SEVERS, HOSA HOLLEY, NOLEY BUCK, JOHN H. JONES, ELMER HILL, THOMPSON KING, AND SEBORN SMITH

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on February 6, 1951.

OPINIONS BELOW

The opinions of the Indian Claims Commission (R. 21-29, 102-110) are not reported. The opinion of the Court of Claims (R. 118-126) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered February 6, 1951 (R. 126). The jurisdiction of this Court rests upon 28 U. S. C. 1255.[1]

QUESTIONS PRESENTED

1. Whether jurisdiction is lacking under the Indian Claims Commission Act for this suit because (a) the claim is not that of a "tribe, band, or other identifiable group of American Indians" and (b) it is an aggregate of individual claims rather than a common claim.

2. Whether the Senate finally determined the amount of the claims of the loyal Creek Indians at $600,000 as it expressly stated or whether, because of an initial vote of the Senate for $1,200,000 in the process of that enactment, an indebtedness of an additional $600,000 remains.

3. Whether the releases required by Congress and executed by the Creek Nation and the indi-

[1] The Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U. S. C. 70s, provides in section 20(c) that determinations of questions of law by the Court of Claims shall be subject to review by this Court in the manner prescribed by section 3 of the Act of February 13, 1925, which now has been superseded by 28 U.S.C. 1255. Since the Act makes no provision as to the time for filing a petition for certiorari, the general provisions of 28 U. S. C. 350 (1946 ed.) would appear to be applicable.

vidual Indians, accepting $600,000 in full settlement, finally disposed of the claims.

STATUTES INVOLVED

Section 26 of the Act of March 1, 1901, 31 Stat. 861, 869, provides:

> All claims of whatsoever nature, including the "Loyal Creek claim" under Article Four of the treaty of eighteen hundred and sixty-six, and the "Self-emigration claim" under Article Twelve of the treaty of eighteen hundred and thirty-two, which the tribe or any individual thereof may have against the United States, or any other claim arising under the treaty of eighteen hundred and sixty-six, or any claim which the United States may have against said tribe, shall be submitted to the Senate of the United States for determination; and within two years from the ratification of this agreement the Senate shall make final determination thereof; and in the event that any sums are awarded the said tribe, or any citizen thereof, provision shall be made for immediate payment of same.
>
> Of these claims the "Loyal Creek claim," for what they suffered because of their loyalty to the United States Government during the civil war, long delayed, is so urgent in its character that the parties to this agreement express the hope that it may receive consideration and be determined at the earliest practicable moment.
>
> Any other claim which the Creek Nation may have against the United States may be

> prosecuted in the Court of Claims of the United States, with right of appeal to the Supreme Court; and jurisdiction to try and determine such claim is hereby conferred upon said courts.

The relevant portion of the Indian Appropriation Act of March 3, 1903, 32 Stat. 982, 994-995, provides:

> In pursuance of the provisions of section twenty-six of an Act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes, approved March first, nineteen hundred and one, there is hereby awarded, as a final determination thereof, on the so-called "loyal Creek claims" named in said section twenty-six, the sum of six hundred thousand dollars, and the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, and made immediately available. And the Secretary of the Treasury is hereby authorized to pay, under the direction of the Secretary of the Interior, to the loyal Creek Indians and freedmen named in articles three and four of the treaty with the Creek Nation of Indians of June fourteenth, eighteen hundred and sixty-six, the said sum of six hundred thousand dollars, to be paid to such Indians and freedmen only whose names appear on the list of awards made in their behalf by W. B. Hazen and F. A. Field, as commissioners on behalf of the United States to ascertain the losses of said Indians and freedmen as provided in said articles three

> and four; and such payments shall be made in proportion of the awards as set out in said list: *Provided,* That said sum shall be accepted by said Indians in full payment and satisfaction of all claim and demand growing out of said loyal Creek claims, and the payment thereof shall be a full release of the Government from any such claim or claims * * *.

The relevant portion of section 2 and section 13(a) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 1052, 25 U.S.C. 70 (a) and 70 (l) provide:

> Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United

States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

* * * * *

Sec. 13. (a) As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission, together with the names of aged or invalid Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

STATEMENT

In this action the descendants of 1,523 Creek Indians who were loyal to the United States during

the Civil War seek compensation under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70(a)-70(w), for property lost or destroyed in that war. The Indian Claims Commission denied recovery. The Court of Claims awarded $600,000. The facts are as follows:

During the Civil War, the Creek Nation aligned itself by treaty with the Confederate States of America. Several thousand individuals of the Creek Nation, however, remained loyal to the United States. These were driven from the reservation. The personal property and improvements on the lands of many of them were taken or destroyed. At the end of the war, the United States and the Creek Nation concluded a treaty on June 14, 1866, 14 Stat. 785, pursuant to which a roll of the loyal Creek Indians was made showing the losses of individuals and $100,000 was paid to them out of Creek tribal funds in proportion to their individual losses.

By Act of March 1, 1901, 31 Stat. 861, *supra*, pp. 3-4, Congress approved an agreement with the Creek Nation wherein, among other things, it was provided that the claims of the loyal Creek Indians should be submitted to the Senate of the United States for final determination. Pursuant thereto, the claims were submitted and the Senate referred them to its Committee on Indian Affairs. On February 16, 1903, the Committee reported out an Indian Appropriation Bill which had originated in

the House (H.R. 15804), with several amendments, and recommended its passage. Included among the amendments was an addition to the House bill of $1,200,000 for the loyal Creek claims, pursuant to the Act of March 1, 1901. 36 Cong. Rec. 2252.

The Senate passed the Indian Appropriation Bill as so amended. 36 Cong. Rec. 2255. The House refused to concur in the Senate amendment. A Conference Committee was appointed which agreed upon a reduction of the amount to $600,000. It also inserted a proviso in the text of the bill that the said sum shall be accepted in full payment and release of all such claims. 36 Cong. Rec. 2626.

The report of the Conference Committee was agreed to by both the Senate (36 Cong. Rec. 2627) and the House (36 Cong. Rec. 2770) and the bill, as thus amended, became the Act of March 3, 1903, 32 Stat. 982, *supra,* pp. 4-5.

On May 23, 1903, the National Council of the Creek Nation adopted a resolution, approved by the President of the United States as required by law, accepting the $600,000 in full satisfaction and release "of all claims and demands growing out of said Loyal Creek claims" (R. 83-84). Thereafter, the $600,000 (less $90,000 paid the attorneys) was paid to the 4,506 claimants, then existing, by March 1905 in proportion to the individual losses. Each claimant signed a statement accepting the sum received in "full and complete settlement" for property lost during the Civil War (R. 88a).

In December 1946, the respondents instituted this action in the Indian Claims Commission. Contending that the first vote of the Senate granting the loyal Creek Indians $1,200,000 was final, they sought the unpaid $600,000 and also the $90,000 withheld from the previous payment for attorneys' fees, together with interest on both sums at 5 per cent from July 1, 1903, to January 1, 1947, in the sum of $1,500,750, making a total of $2,190,-750 (R. 6-7). In the alternative, "in the event of an adversary contest," they asked that the Government be required to account on the basis of having the interest compounded annually, commencing July 1, 1904, making a total award of $9,500,000 (R. 7).

The United States moved to dismiss the petition on the grounds (a) that "The Loyal Band or Group of Creek Indians, and the Loyal Creek Claimants' Committee" are not a "tribe, band, or other identifiable group of American Indians" within the meaning of Section 2 of the Indian Claims Commission Act, *supra,* pp. 5-6, and (b) that the claim was not a common claim of a group but an aggregate of individual claims (R. 7-20). The Indian Claims Commission in an opinion of May 6, 1949, concluded that it had jurisdiction and accordingly denied the motion (R. 21-29).

Thereafter the Government on June 14, 1949, filed its answer raising anew, among other defenses, the issues as to the jurisdiction of the Indian

Claims Commission to consider this type of claim (R. 30-34). On the merits, the Indian Claims Commission decided in favor of the United States, Commissioner Witt dissenting, and dismissed the petition on July 14, 1950 (R. 102-116). The grounds for decision were (a) that the only final action of the Senate in determining the award was at the time it fixed the sum of $600,000, (b) that, in any event, the claimants by accepting the award were, and now are, estopped to deny its finality, and (c) that "the Government cannot be charged with unfair or dishonorable dealings in doing what the Creek Nation agreed it could do, namely, pay a gratuity which had been fixed by the Senate, as required by the agreement" (R. 102-110).

The Court of Claims reversed the Commission and awarded the loyal Creeks $600,000.[2] The ground for the decision was that "As to the Senate's thinking on the question, when it made its determination of $1,200,000, we have no doubt that it intended that to be its award, pursuant to the agreement" (R. 123). The court held that the releases were not binding because the payment of a portion of a liquidated sum "which is clearly owed" does not discharge the whole debt (R. 124). Chief Judge Jones and Judge Littleton concurred separately on the ground that the claims should be paid on the basis of fair and honorable dealings, a ground au-

[2] The court stated its desire to award interest for the forty-seven years, but reluctantly did not do so because decisions of this Court plainly forbade it.

thorized by the Indian Claims Commission Act (R. 125-126).

REASONS FOR GRANTING THE WRIT

1. Section 2 of the Indian Claims Commission Act, *supra,* p. 5, authorizes claims to be heard only on behalf "of any Indian tribe, band, or other identifiable group of American Indians." That is an express limitation on jurisdiction which bars the respondents here from prosecuting this suit.

Indians belong to any number of identifiable groups. Among others, they are members of ethnological, political, religious, occupational, fraternal and civic groups. The phrase "identifiable group" in the Act becomes so broad as to lose all significance if the rule *ejusdem generis* is not applied so as to restrict it to a political unit as a "tribe" or "band." The Act itself implies that limitation in Section 13(a), *supra,* p. 6, by qualifying the phrase with the words "existing as distinct entities, residing within the territorial limits of the United States or Alaska."

Sponsors of the legislation before Congress made it clear that the proposed law "only relates to tribal claims or claims of bands. * * * It would not cover individual claims of Indians." Hearings of the Committee on Indian Affairs, House of Representatives, on H.R. 1198 and H.R. 1341, 79th Cong., 1st Sess., p. 77. The bill was not intended to "throw you over to the people who have made themselves into a group, a lot of individual claimants

who had formed themselves into a group merely in order to get into this court." Hearings of the Senate Committee on Indian Affairs on S. 2731, 74th Cong., 1st Sess., p. 40.

The loyal Creek veterans and refugees of the Civil War and their descendants are in fact and, contrary to the holding of the Indian Claims Commission, have always been treated by the judicial, executive, and legislative branches of the Government merely as individual members of the Creek Nation without independent group existence or power. In 1884, the Court of Claims refused an action by the original 1,523 loyal Creek Indians to recover a sum in addition to that allowed by the treaty of 1866 on the ground that, as citizens of the Creek Nation, they could not act independently of the Creek Nation and the latter had accepted the treaty sum in full settlement of all claims arising out of the Civil War. *Connor, et al.* v. *United States,* 19 C. Cls. 675, 679. In April 1903, the Attorney General ruled that the $600,000 awarded by the Act of March 3, 1903, was to be accepted, not by the loyal Creek claimants, but by the Creek Nation, "the nation being the natural representative of such a claim by its citizens." 24 Op. A.G. 623, 633-634.[3] Congress has never acknowledged

[3] If, as held by the Attorney General in 1903, the acceptance of that sum paid on the claims of individuals had to be accepted by their natural representative, the Creek Nation, it follows that, if any further claim could exist on the same subject matter as a group claim, the claimant must be the same entity or group with which Congress previously dealt and which accepted the previous payment on the same obligation.

the loyal Creeks as a group. On the contrary, it treated with "All claims of whatsoever nature, including the 'Loyal Creek claim' * * *, which the tribe or any individual thereof may have against the United States" in the Act of March 1, 1901, and with "the so-called 'loyal Creek claims'" in the Act of March 3, 1903.

The individuality of the claims has been emphasized elsewhere. In the treaty of June 14, 1866, providing for payment of $100,000 from tribal funds, it was stated that the sum was to be paid "in proportion to their respective losses." In the 1903 Act, Congress provided that payment of the $600,000 "shall be made in proportion to the awards as set out in said list." On June 14, 1904, the Attorney General stated that the latter Act "recognizes, in each of the Creek Indians whose names appear on the Hazen and Field roll, a valid claim against the United States" and that the appropriated sum "is an individual asset of a limited number of the tribesmen." 25 Op. A. G. 163, 166.

The situation here is similar to that in *Blackfeather* v. *United States,* 190 U.S. 368, where suit was brought by the principal chief of the tribe for depredations committed by white citizens upon the properties of various Indians. The Court of Claims sustained a demurrer (37 C. Cls. 233) and this Court affirmed (190 U. S. at 378) on the ground that the claims referred to in the jurisdictional act "were the claims of the Shawnee tribe or band of Indians, and not the personal claims of the

individual Indians belonging to said tribe or band of Shawnees." Cf. *United States* v. *Blackfeather*, 155 U. S. 180, 195. The Indian Claims Commission distinguished that case from the instant case on the ground that there the suit was "a common action for individual and independent claims" while here "the claim is for the enforcement of an alleged obligation in which the Indians, or their heirs, who composed the Loyal Creeks, have a common interest in the subject matter" (R. 28). But the referenced "common interest in the subject matter" is not a ground for distinction. The circumstance here that the Senate dealt with these claims together because of their common origin and voted $600,000 in a single sum, rather than compute and itemize each award, did not create a common interest in the subject matter in the sense of a common claim. The sum was arrived at on the basis of a list of individual losses (R. 94-98) and payment was to be determined by that list and made to individuals for specific and distinct property lost to each of them. Each individual was to receive a fixed, easily calculable sum. If any claims exist, they are for those sums individually and independently.

This Court has defined a tribe or a band of Indians as a group "united in a community under one leadership or government" with "independence of action, continuity of existence, a common leadership and concert of action." *Montoya* v. *United States*, 180 U.S. 261, 266. Reason requires that

Congress intended the "other identifiable group", as used in the Indian Claims Commission Act, to possess characteristics of that nature as a basis for unity rather than the single, tenuous bond of having individual claims arising from a common event. It is putting effect before cause to recognize the existence of a group by reason of the existence of related claims. On such a basis, any two or more Indians asserting claims which could be joined in a single action would constitute an identiafiable group.

Given a group, the Act creates a right for it to sue on its claims; but, given claims, the Act does not create a group entitled to sue. The sole basis here for a group is the existence of claims. The loyal Creeks have never acted in concert except to secure further allowances of their claims. Their loyalty during the Civil War was not group action. They have never had a political organization apart from that of the Creek Nation. They have never been a communal group. They have never been recognized by the United States as a separate entity, political or otherwise. Their present association is purely one of convenience formed apparently to collect an alleged claim against the United States. In every other respect, the loyal Creeks occupy the same positions as other members of the Creek Nation. Their claim is an aggregate of distinct, individual claims. From these circumstances, it is evident that the association of

the respondents does not constitute them a "tribe, band or other identifiable group" *existing as a distinct entity,* with a common claim, entitled to invoke jurisdiction for this action.[4]

2. By the Act of 1903, pursuant to the 1901 Agreement, there was "awarded as a final determination" of the so-called "loyal Creek claims" $600,000, and that amount was appropriated to be disbursed by the Secretary of the Treasury on condition that acceptance should be "in full payment and satisfaction of all claim and demand." The intent to dispose conclusively of these claims could not be more clearly manifested. The reasoning of the Court of Claims resulting in a frustration of that intent and an award of an additional $600,000 is demonstrably fallacious.

By the Act of March 1, 1901, the Senate was to make the determination as to the amount, if any, to be given the loyal Creek Indians. The Act did not prescribe the procedure to be followed by the Senate in making that determination. Thus, the Senate was the sole judge of the procedure to be adopted. It might have proceeded by simple resolution whereby it acts alone and its action alone is final when signed by the Secretary of the Senate.

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[4] While passed upon by the Indian Claims Commission, this question was not discussed in the opinion of the Court of Claims upon appeal, undoubtedly because it had not been urged as an alternative ground for affirmance of the judgment. The record fully discloses the facts and the arguments upon this issue and since the question is jurisdictional it is, we believe, properly presented for review by this Court.

McKee, *Manual of Congressional Practice,* p. 125. It did not do this. It elected, as it could, to act through a bill, which for finality required concurrence by the House of Representatives and the signature of the President. U. S. Const., Art 1, Sec. 7; McKee, *Manual of Congressional Practice,* pp. 161-162. Under the latter procedure, no intermediate step in the legislative process is final or of any force whatsoever. The decision of the Court of Claims ascribes to a bill the characteristics of a resolution and finds finality where none exists under congressional procedure prescribed by the Constitution. The Court of Claims did not have the power so to change the legislative process.

The assertion by the Court of Claims that "the Senate's thinking on the question" was that its first vote for $1,200,000 was the final award pursuant to the Act of 1901 is totally without basis. The remarks of Senator Quarles prior to the first vote stating that the Senate was then sitting alone as a court of arbitration (heavily emphasized by the Court of Claims) cannot override the inevitable meaning of the procedure followed by the Senate. Under the procedure knowingly adopted by the Senate, its intention can only be taken from the legislative procedure it actually followed. Its final action, which became the Act of 1903, unequivocally "awarded, as a final determination" $600,000, and no more, "in full payment and satisfaction" of the claims expressly pursuant to the 1901 agreement

with the Creek Nation. That action of the Senate leaves nothing open for construction.[5]

3. Assuming *arguendo* that the initial action of the Senate awarding $1,200,000 constituted its final determination, the fact remains that both the Creek Nation and the individual claimants thereafter accepted $600,000 in full and complete satisfaction of the claims and released the Government from any further such claims (R. 83-84, 88a). The Court of Claims held that the releases were not binding because not supported by consideration. But the rule requiring consideration for releases between individuals has no application in suits by Indians against the United States because the relation between them is different from that existing between individuals. *Klamath Indians* v. *United States,* 296 U. S. 244, 254-255. Moreover, the rule is not appropriate to a gratuity where consideration has never been a factor. The award by the Senate was no more than an expression of willingness to *give* the Indians $1,200,000 because of the losses they suffered as a result of their loyalty. Finally, if the Senate created a legal indebtedness, it created one which could be released for a lesser sum, because

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[5] The concurring opinion of Chief Judge Jones and Judge Littleton does not supply a valid basis for recovery here. As was well understood from the outset of the negotiations with the Indians, there was no legal or moral obligation on the part of the United States to pay anything. S. Rept. 3088, 57th Cong., 2d sess., p. 5; *Grant* v. *United States,* 7 Wall. 331, 337; *Turner* v. *United States,* 248 U.S. 354; *Connor, et al.* v. *United States,* 19 C. Cls. 675 (1884). An award based on a gratuity cannot correctly be held unfair and dishonorable.

the creator of it, as a part of the same transaction, also created by agreement with the House the condition that a release be executed upon payment of $600,000.

It is incongruous to give meaning to the Senate's initial vote while giving no meaning and intent to the requirement in the final measure for a full release for a lesser sum. It is extreme to say that the requirement of a release was an idle act on the part of both Houses of Congress and the President. It is equally extreme to say that the President in approving the resolution of the Creek Nation, acknowledging full settlement and releasing the Government, performed a meaningless act. The payment of the $600,000 was sufficient consideration for the release. The Indians "may not avoid the release given in accordance with the Act upon the ground that the payment was too small. That would enable them to question the laws of Congress in fields where, because of the relationship referred to, they are supreme." *Klamath Indians* v. *United States,* 296 U.S. 244, 254-255.

4. Suits instituted and to be instituted under the Indian Claims Commission Act by Indians who claim to constitute "a tribe, band, or other identifiable group" are numerous and involve large sums of money.[6] It is important that the scope of

[6] See Appendix A to the Government's brief in *United States* v. *Alcea Band of Tillamooks, et al.*, No. 281, O.T., 1950. In addition to those listed as having already been filed, over 100 contracts between Indian groups and attorneys for suits under that statute have been approved by the Department of the

the Act in that particular be authoritatively defined.

The question as to the validity of releases given by Indians is far-reaching both under the Indian Claims Commission Act and outside of it. Indians have given releases to the Government in settlement of their claims in a great many instances from the beginning of their dealings with the Government. The decision of the Court of Claims makes meaningless all of those given where the obligation had been reduced to a sum certain before the release for a lesser sum. It casts troublesome doubt on all the rest because it applies the doctrine of consideration to a relationship where it was heretofore thought to be inapposite. In the latter respect, at least, the decision seems in conflict with *Klamath Indians* v. *United States,* 296 U. S. 244.

In the aggregate the outcome of Indian litigation has a substantial impact on the fiscal operation of the Government. The cases are sufficiently related in fact and in spirit so that an erroneous decision in one is carried over to the next. It is thus important in this early case under the Indian Claims Commission Act that the conflict of viewpoints between the Indian Claims Commission and the Court of Claims be resolved.

Interior. Presumably, most of these and subsequent ones will proceed to judgment. As here, the Department of the Interior approves such contracts without conceding that the "group" comes within the Act (R. 64).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1951.

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IN THE

Supreme Court of the United States

October Term, 1950

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

THE LOYAL BAND OR GROUP OF CREEK INDIANS, AND THE LOYAL CREEK CLAIMANTS' COMMITTEE, ON THE RELATION OF JOSEPH BRUNER, S. W. BROWN, JESSE MCDERMOTT, LASLEY HAYNES, BEN JOHNSON, ROBERT SEVERS, HOSA HOLLEY, NOLEY BUCK, JOHN H. JONES, ELMER HILL, THOMPSON KING, AND SEBORN SMITH

On Petition for a Writ of Certiorari to the Court of Claims

BRIEF OF RESPONDENTS IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1950

The United States of America, *Petitioner*,

v.

The Loyal Band or Group of Creek Indians, and the Loyal Creek Claimants' Committee, on the Relation of Joseph Bruner, S. W. Brown, Jesse McDermott, Lasley Haynes, Ben Johnson, Robert Severs, Hosa Holley, Noley Buck, John H. Jones, Elmer Hill, Thompson King, and Seborn Smith

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On Petition for a Writ of Certiorari to the Court of Claims

BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinions of the Indian Claims Commission are not reported. The opinion of the Court of Claims in this case has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered February 6, 1951 (R. 126). The jurisdiction of this Court rest upon 28 U. S. C. 1255 and Section 20(b) and (c) of the Act of August 13, 1946 creating the Indian Claims Commission, 60 Stat. 1049.

QUESTIONS INVOLVED

1. (a) Whether the decision of the Court of Claims made conclusive the findings of fact of the Indian Claims Commission that the "Loyal Creeks" were an "identifiable group of Indians residing within the territorial limits of the United States".

(b) If not conclusive, then whether the record presents substantial evidence of that fact.

2. Whether the authority of the Indian Claims Commission to adjudicate the claims of an "identifiable group of American Indians" intended to limit the authority to groups constituting a political unit, such as a tribe or band, and existing as a distinct entity.

3. Whether the claim herein asserted is a group claim or the aggregate of individual claims.

4. Whether the established rules of law relating to the subject of "Arbitration and Award" apply in a case where the arbitrator is the Senate of the United States, and where the determination is announced by the Senate in a proposed amendment to a pending bill theretofore passed by the House of Representatives.

5. Whether the established rules of law relating to the subject of "Arbitration and Award" apply to cases wherein the United States is a party.

6. Whether the established rules of law with respect to the ineffectiveness of a release given upon the pay-

ment of a part of a liquidated debt to Indians, in the absence of a new consideration, applies in a case where the debtor is the United States.

STATUTES INVOLVED

The relevant parts of section 2, section 13(a) and section 20(b and c) of the Act of August 13, 1946, creating the Indian Claims Commission (60 Stat. 1049, 1050, 1052) are as follows:

> Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.
>
> All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

• • • •

Sec. 13. (a) As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission, together with the names of aged or invalid Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

• • • •

Sec. 20(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court

shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288), as amended.

Section 26 of the Act of March 1, 1901, 31 Stat. 861, 869, provides:

All claims of whatsoever nature, including the "Loyal Creek claim" under Article Four of the treaty of eighteen hundred and sixty-six, and the "Self-emigration claim" under Article Twelve of the treaty of eighteen hundred and thirty-two, which the tribe or any individual thereof may have against the United States, or any other claim arising under the treaty of eighteen hundred and sixty-six, or any claim which the United States may have against said tribe, shall be submitted to the Senate of the United States for determination; and within two years from the ratification of this agreement the Senate shall make final determination thereof; and in the event that any sums are awarded the said tribe, or any citizen thereof, provision shall be made for immediate payment of same.

Of these claims the "Loyal Creek claim," for what they suffered because of their loyalty to the United States Government during the civil war, long delayed, is so urgent in its character that the parties to this agreement express the hope that it may receive consideration and be determined at the earliest practicable moment.

Any other claim which the Creek Nation may have against the United States may be prosecuted in the Court of Claims of the United States, with right of appeal to the Supreme Court; and jurisdiction to try and determine such claim is hereby conferred upon said courts.

The relevant portion of the Indian Appropriation Act of March 3, 1903, 32 Stat. 982, 994-995, provides:

> In pursuance of the provisions of section twenty-six of an Act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes, approved March first, nineteen hundred and one, there is hereby awarded, as a final determination thereof, on the so-called "loyal Creek claims" named in said section twenty-six, the sum of six hundred thousand dollars, and the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, and made immediately available. And the Secretary of the Treasury is hereby authorized to pay, under the direction of the Secretary of the Interior, to the loyal Creek Indians and freedmen named in articles three and four of the treaty with the Creek Nation of Indians of June fourteenth, eighteen hundred and sixty-six, the said sum of six hundred thousand dollars, to be paid to such Indians and freedmen only whose names appear on the list of awards made in their behalf by W. B. Hazen and F. A. Field, as commissioners on behalf of the United States to ascertain the losses of said Indians and freedmen as provided in said articles three and four; and such payments shall be made in proportion of the awards as set out in said list: *Provided,* That said sums shall be accepted by said Indians in full payment and satisfaction of all claim and demand growing out of said loyal Creek claims, and the payment thereof shall be a full release of the Government from any such claim or claims * * *.

STATEMENT

The origin of the group of Creek Indians known as the Loyal Creeks is explained in findings 1 and 2 of the Indian Claims Commission. The findings appear in the record at page 93 and are as follows:

> "1. That the individuals whose names appear in the title, namely, Joseph Bruner, Jesse McDermott

and S. W. Brown (see stipulation filed herein March 17, 1950), are Creek Indians and are descendants and heirs at law of persons who were members of the group of Creek Indians and freedmen who remained loyal to the United States during the Civil War and who are historically known and have been recognized by the executive, legislative and judicial branches of our government as "Loyal Creeks" and "loyal refugee Indians and Freedmen." That the claim here involved is submitted and prosecuted by said named persons for and on behalf of all members, and the descendants of members, of such group.

2. At the beginning of the Civil War, and for long prior thereto, the Creek Nation of Indians was located in the Indian Territory in what is now the State of Oklahoma, and at the commencement of hostilities in said war the members of the Creek Nation were about evenly divided in their sentiments between the Confederacy and the United States. However, the governing authorities of the Creek Nation supported the Confederacy and many members of the Nation joined in hostilities against the United States, and in fact, on July 10, 1861, concluded a treaty with the Confederate States of America by which they agreed that there should be perpetual peace and friendship and an alliance, offensive and defensive, between themselves and the Confederate States of America. The members of the Creek Nation who remained loyal to the United States were, as stated above, known as the "Loyal Creeks" and were driven from their homes in the Creek Reservation. Their personal property, consisting of improvements upon their lands, machinery and livestock, was destroyed by enemy forces and the Loyal Creeks were required to seek refuge and protection behind the lines of the Federal forces. That as a result of enemy action, the losses sustained by the Loyal Creeks amounted to a large sum of money, as will hereinafter be shown. Many of the male members of the Loyal Creeks joined the Federal forces and served during the Civil War."

At the end of the war between the States, and on June 14, 1866, a treaty was concluded between the Creek

Nation and the United States whereby the Creek Nation ceded to the United States the western half of their lands in Indian Territory and out of the consideration for the lands ceded it was provided that:

> "One hundred thousand dollars shall be paid in money and divided to soldiers that enlisted in the Federal Army and the loyal refugee Indians and freedmen who were driven from their homes by the rebel forces, to reimburse them in proportion to their respective losses." (Art. 3, 14 Stat. 785)

Subsequent to the making of the Treaty of 1866, and pursuant thereto, a roll of those entitled to participate in the $100,000 was made. The total number of names placed thereon was 1523. The total amount of their losses was determined to be $1,836,840.41. The $100,000 was paid to the enrollees in proportion to their respective losses. (Com. Findings 3 and 4, R. pp. 93-94).

Notwithstanding a continued insistence by the Loyal Creeks that their losses as determined be paid, defendant failed and refused to pay or make provision for the payment of the same until the parties again came together to negotiate the agreement approved by the Act of Congress of March 1, 1901 (31 Stat. 861), whereby the Creeks agreed, among other things, that their lands be allotted in severalty, that the right of the Creeks to self government be surrendered, and that their lands be embraced within a state of the Union. Section 26 of the agreement relates to the "Loyal Creek Claim" and is as follows:

> All claims of whatever nature, including the "Loyal Creek claim" under Article Four of the Treaty of Eighteen Hundred Sixty-six, and the "Self-emigration claim" under Article Twelve of the Treaty of Eighteen Hundred Thirty-two, which the Tribe or any individual thereof may have against the United States, or any other claim which the United States may have against said Tribe, shall be submitted to the Senate of the United States for determi-

nation; and within two years from the raitfication of this agreement the Senate shall make final determination thereof; and in the event that any sums are awarded the said Tribe, or any citizen thereof, provision shall be made for immediate payment of the same.

Of these claims the "Loyal Creek claim," for what they suffered because of their loyalty to the United States Government during the Civil War, long delayed, is so urgent in its character that the parties to this agreement express the hope that it may receive consideration and be determined at the earliest practicable moment.

In carrying out its duty as an arbitrator, pursuant to the foregoing Act, with respect to the "Loyal Creek claim", the matter was referred to its Committee on Indian Affairs, which at the time had before it the annual Indian appropriation bill. Thereafter the Committee made its report as follows:

> We considered the Creeks had strong equities and have deducted from the amount allowed by Hazen and Field, the $100,000 which has been paid them, and deducted a further sum of $536,830.40 and recommend the payment of the balance amounting to $1,200,000, to be distributed to the claimants or their heirs, in the proportion indicated by the original list of awards.

The Committee also reported a proposed amendment to the pending Indian Appropriation Bill as follows:

> In pursuance of the provisions of Section 26 of an act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes, approved March 1, 1901, *there is hereby awarded as final determination thereof on the so-called 'loyal Creek claims,' named in said Section 26, the sum of $1,200,000, and the same is hereby appropriated* out of any money in the Treasury not otherwise appropriated, and made immediately available. And the Secretary of the Treasury is hereby authorized to pay, under the direction of the Secretary of

> the Interior, to the loyal Creek Indians and freedmen named in Articles 3 and 4 of the treaty with the Creek Nation of Indians of June 14, 1866, the said sum of $1,200,000, to be paid to such Indians and freedmen only whose names appear on the list of awards made in their behalf by W. B. Hazen and F. A. Field, as commissioners on behalf of the United States to ascertain the losses of said Indians and freedmen as provided in said Articles 3 and 4, and such payments shall be made in proportion of the awards as set out in said lists and shall be in full settlement and satisfaction of all claims under said Articles 3 and 4: (Italics supplied.) (Commissioner's Finding 6, R. p. 95-96).

The proposed amendment was agreed to by the Senate, and with that amendment, and others not pertinent here, the Bill was passed by the Senate.

The House would not agree to the Senate amendment appropriating $1,200,000 to pay the "Loyal Creek claim". Thereupon the matter was referred to conference committees. Although the Senate conferees contended that the Senate had acted on the matter as an arbitrator and that its determination of the award was conclusive, and held out for those contentions for many days, the House conferees refused to agree to an appropriation to pay the award. A compromise followed resulting in the reduction of the appropriation to $600,000 to be paid upon the following condition:

> "That said sum shall be accepted by said Indians in full payment and satisfaction of all claim and demand growing out of said loyal Creek claims, and the payment thereof shall be in full release of the Government from any such claim or claims;" (Op. C. Cls. R. p. 118, 120-121; Finding 7, I. C. Com. R. pp. 96-98.)

The question then arose with the Indian Office and the Secretary of the Interior with respect to what authority should execute the release. The Commissioner of Indian

Affairs concluded that the release should be given by direction of a convention of those Creek Indians who were "Loyal Creeks" or the descendants of "Loyal Creeks". (R. p. 67, 70). Thereupon a convention of the "Loyal Creeks" adopted a resolution accepting the appropriation on the terms proposed by the Act making the same. (R. pp. 73-75). Subsequently an opinion of the Attorney General was rendered to the Secretary of the Interior in which the Attorney General advised that the release required by the Act should be given by the Creek Nation because the obligation was created by an agreement with the Creek Nation (Op. A. G. 623, 633), and for that reason was the "natural representative" of the "Loyal Creeks". However a release given pursuant to the action of a convention of the "Loyal Creeks" and a release given by the Creek Nation did not satisfy all governmental requirements. When payments were made to those entitled to participate in the award they too were required to give full acquittance of their interest in the claim.

The Indian Claims Commission by majority action dismissed the petition on the grounds that: (a) it required the action of the Senate in its legislative capacity as well as its action as an arbitrator to make the award final, (Com. Op. R. pp. 102, 108), (b) that by accepting the money appropriated the "Loyal Creeks" were estopped to deny that the final award was other than $600,000, (Com. Op., R. pp. 102, 108), and (c) that since "the final award was in the sum of $600,000, so the Government cannot be charged with unfair and dishonorable dealings in doing what the Creek Nation agreed it could do, namely, pay a gratuity which had been fixed by the Senate as required by the agreement." (Com. Op., R. pp. 102, 109).

Chief Commissioner Witt rendered a dissenting opinion in which he challenged the correctness of the conclusions reached by his associate Commissioners.

On appeal from the judgment of the Commission the Court of Claims reversed the Commission and held that the final award of the Senate was for $1,200,000 and further that the releases given were not binding because they were given upon the payment of a sum less than the amount of the liquidated debt and without a new consideration.

ARGUMENT

1. Jurisdiction of Indian Claims Commission.

Petitioner contends that the Indian Claims Commission was not authorized by the Act creating the Commission to determine the claim of an "identifiable group of American Indians" unless the "identifiable group" was "a political unit" as a "tribe" or "band", and that the "Loyal Creeks" did not constitute such a group.

Petitioner's support of the contention is based upon two conclusions. The first is, that unless the phrase "identifiable group" was intended to mean an identifiable group having a political status like that of a tribe or band then the Act becomes so broad it will lose significance unless the rule of *ejusdem generis* is applied. The second is that Section 13(a) of the Act creating the Commission, which relates to the subject of an explanation of the provisions of the Act, contains the implication that the phrase "identifiable group", as used in the jurisdictional section of the Act, implies that an "identifiable group" is not authorized to present a claim unless the group exists as a "distinct entity".

The Act creating the Commission says: "The Commission shall hear and determine the following claims

against the United States on behalf of any Indian tribe, band, *or* other identifiable group of American Indians residing within the territorial limits of the United States or Alaska". (Italics supplied).

The words "identifiable" and "group" are common words. They have a well established and recognized meaning when used in any connection. Therefore when Congress granted a "group" of Indians the right to present a claim to the Commission if the group was "identifiable" it did not expressly or impliedly require that the group have the "political" status of a "tribe" or "band" of Indians. Had Congress so intended then it had at hand words which would have been used to express that intention.

The rule of *ejusdem generis* is only applied when it becomes necessary to construe an act. It is never applied to defeat the plain intent of an act. *United States* v. *Mescall*, 215 U. S. 26.

The use of the conjunctive "or" in Section 2 of the Act shows that Congress intended that the "identifiable group" be a group having a status different from that of a tribe or band. Moreover the "identifiable group" may be a group within a tribe or band. Such a group if "identifiable" is authorized to present a claim to the Commission.

Section 13(a) of the Indian Claims Commission Act relates solely to the subject of notice to the Indians with respect to the provisions of the Act in order that their claims be presented. That section was not intended to enlarge upon, detract from, or explain the jurisdiction of the Commission as set forth in Section 2 of the Act. However Petitioner's contention that Section 13(a) implies that the "groups" authorized to present claims must be groups "existing as distinct entities".

Instead of Section 13(a) supporting Petitioner's contention it is obvious that it renders the contention wholly unfounded. Because explanations of the provisions of the Act were required to be sent to "identifiable groups" only if they "existed as distinct entities". If however the "identifiable group" was a group within a tribe or band then the "explanation" to the head of the tribe or band would be sufficient as an explanation to the "identifiable group" within that tribe or band.

The next contention advanced by Petitioner with respect to jurisdiction of the Commission is based upon the proposition that the claim asserted is not a group claim but an aggregate of individual claims.

This action was brought by a group of Indians to recover a specific sum of money which the Government agreed to pay. The money, if recovered, will be distributed *pro rata* to members of the group of "Loyal Creek" Indians or their descendants as required by the law creating the obligation. Had the Act conferred jurisdiction to determine individual claims, no individual claimant would have been permitted to have an adjudication without bringing into the case all other parties who had a right to share in the fund involved. If Petitioner's contention is sound, then in a case where by a treaty the Government agreed to pay the consideration for lands ceded by a tribe to the members of the tribe *per capita* and had failed to pay as agreed, then a right granted the tribe to enforce the observance of treaty obligations would fail because the money was not tribal money but the money of the individual members of the tribe. Such cases have been presented to the Court of Claims and to this Court, in which both courts permitted a recovery in an action brought by the tribe, but directed that the money recovered be dispersed by officers of the United States to the individual members of the tribe. The cases referred to are: *Western Cherokee Indians* v. *United*

States, 27 C. Cls. 1; 148 U. S. 427, and *Eastern Cherokee Indians* v. *United States,* 40 C. Cls. 252; 202 U. S. 101.

The situation here is not "similar to that in *Blackfeather* v. *United States,* 190 U. S. 368". In the *Blackfeather* case there was no common fund in which the individual had an interest. The claims there involved were distinct claims of individuals. Furthermore the action was brought under the authority of an Act which granted jurisdiction to determine claims of the Shawnee Tribe of Indians, not the claims of individual Shawnees.

When the case of *Connor, et al,* v. *United States,* 19 C. Cls. 675, was decided (1884), there was no common fund in which the "Loyal Creeks" had an interest. Therefore the decision in that case is not in point here. The Indian Claims Commission made findings of fact which were essential to its jurisdiction. The Court of Claims necessarily held that the findings so made were supported by substantial evidence. In these circumstances the findings are made conclusive by Section 20(b) of the Act creating the Commission. (*Supra,* p. 4).

It is therefore submitted that the Commission was authorized to determine the merits of this suit.

2. The Award of the Senate Acting As An Arbitrator.

As the second reason presented in support of the petition it is asserted that the Court of Claims erred in holding that the final award of the Senate, acting as an arbitrator, was $1,200,000.

In Petitioner's discussion of this question the recognized rules of law with respect to the subject of "Arbitration and Award" are studiously avoided. One of such rules was announced by this Court in the case of *Bayne* v. *Morris,* 1 Wall. 97, wherein it is said:

> "*Arbitrators exhaust their powers when they make a final determination on the matters submitted to*

them. They have no power, after having made an award, to alter it, the authority conferred on them is then at an end.'' (Italics supplied.)

That the Senate's award of $1,200,000 was intended to be the final award is shown to be a fact. That the subsequent action of the Senate with respect to the amount of the award was taken because the House would not agree to the appropriation to pay the amount awarded by the Senate and constituted a compromise for the sole purpose of effecting the appropriation, is also shown to be a fact.

Petitioner's contention is that since the Act authorizing the arbitration did not prescribe the procedure to be followed, the Senate could act on the matter in its legislative capacity, that it did so act, and that in such a case the rules which govern "Congressional Practice" apply with respect to the method of announcing the final award. The fallacy of the contention is obvious. In the first place the rules which govern the Senate, or any other body, chosen to act as an arbitrator, are the rules which govern arbitrations, rather than rules which govern legislative practice. In the second place if the procedure of the Senate, following the adoption of its committee's recommendation with respect to the amount of its award, is in accord with the rules of law on the subject of "Arbitration and Award" then it is possible for the arbitrator, having made the award, to agree to compromise the same with a party having no right to participate therein.

Respondent submits that the opinion of the Court of Claims contains an accurate statement of the law, and that its conclusion with respect to the final award of the arbitrator is correct.

3. The Releases Given Were Ineffective.

Petitioner makes the astounding assertion that the rule with respect to the ineffectiveness of a release in full given upon the payment of a part of a liquidated debt, in the absence of a new consideration, does not apply to the United States in a case where the creditor is an Indian group. Because, as Petitioner says, "the relationship existing between them [and the United States] is different from that existing between individuals". If there should be a difference, the relationship between the United States and the Indians would afford added reasons for the rule. This Court said nothing in its opinion in *Klamath Indians* v. *United States*, 296 U. S. 244, in support of the contention of Petitioner.

In the case of *United States* v. *Bostwick*, 94 U. S. 53, 67, this Court said:

> The United States, when they contract with their citizens, are controlled by the same laws that govern the citizens • • •. All obligations which would be implied against the citizen in the same circumstances will be implied against them.

The obligation of the United States to pay the Senate award was established by contract. There has been no decision by this Court, or any other court, holding that the United States may repudiate a contract made with an Indian tribe by reason of the relationship or for any other reason.

Respondents agree that by virtue of the relationship the United States has the power to administer the assets of an Indian tribe, but denies a power to confiscate its property under the guise of the power to administer. *Creek Nation* v. *United States*, 295 U. S. 203.

It is submitted that the decision of the Court of Claims with respect to the ineffectiveness of the releases was the proper decision.

4. Other Reasons Advanced by Petitioner for the Granting of the Writ.

It is urged that this Court should define the meaning of the expression "a tribe, band, or other identifiable group" as used in the Act creating the Indian Claims Commission, because of the many actions now pending and to be filed before the Commission.

Unless the decision of the Indian Claims Commission with respect to the meaning of the expression, necessarily acquiesced in by the Court of Claims, is erroneous, a denial of the writ would accomplish the end sought.

Petitioner also says that the decision of the Court of Claims holding that the releases given were ineffective "makes meaningless all of those given where the obligation had been reduced to a sum certain before the release for a lesser sum". (Pet. p. 20). If there is an instance, except the present case, where the Government has practiced a like imposition on the Indians Respondents have not discovered it. Certainly such a situation was not shown to exist in the case of *Klamath Indians* v. *United States,* 296 U. S. 244, which Petitioner cites as an authority.

CONCLUSION

For the reasons herein stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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